

This letter discusses nexus and construction contractor issues. See *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410 (1996) regarding nexus and 86 Ill. Adm. Code 130.1940 regarding construction contractors. (This is a GIL).

November 28, 2005

Dear Xxxxx:

This letter is in response to your letter dated May 26, 2005, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at [www.ILTAX.com](http://www.ILTAX.com) to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

We request a clarification of the law concerning Illinois's sales/use tax statutes regarding nexus issues for a foreign (out-of-state) company that provides services to its customers through third-party domestic (in-state) companies. We have organized this request by first stating what we believe to be the relevant facts. We then specifically outline the tax questions we are attempting to address in the Issue section.

We understand that your conclusions will be based on the facts presented and that a change in the facts as we have described them may change the conclusion. Our client is attempting to confirm that they comply with the law, and if not, what changes are required to come into compliance. Therefore, we would greatly appreciate an expedited response.

### **Facts**

Our client sells security locks and materials to businesses located within Illinois and contracts with other third-party (domestic) companies to perform the installation services. Our client has no property, employees, solicitors or places of business in Illinois. The locks and materials are either drop shipped to the customers or to the third

party installers. Our client pays the third-party company for the services provided and subsequently bills their customer for the rendered services.

### **Issue**

Does our client's out of state sales of services to Illinois customers through third-party in state companies create nexus for sales and use tax purposes under Illinois's tax laws?

We appreciate your consideration of this matter. Your timely response is respectfully requested in order that our client can confirm its compliance with Illinois law as soon as possible. If you have any questions, please feel free to call me.

### **DEPARTMENT'S RESPONSE**

Determinations regarding the subject of nexus are normally very fact specific. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax law. The Supreme Court has set out a two prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis will trigger Use Tax collection responsibilities. See *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410 (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the

out-of-State goods and have a duty to self-assess their Use Tax liability and the customer must remit the amount directly to the State. The Use Tax rate is 6.25%.

With regard to items in which title is transferred to customers, taxability will depend upon whether or not these items are permanently affixed to realty. If such items are permanently affixed to a structure so as to constitute real estate, the vendors would owe Use Tax based upon their cost price of the add-ons. This is because Illinois law deems persons who take tangible personal property and convert it into real estate to be construction contractors who are the legal end-users of the property. See the enclosed copy of 86 Ill. Adm. Code 130.1940.

Generally, vendors who sell equipment without permanently affixing it to real estate make retail sales of tangible personal property and are responsible for Retailers' Occupation Tax. Installation of such items may be subject to tax. See 86 Ill. Adm. Code 130.450.

Please note, however, that Section 1 of the Retailers' Occupation Tax Act, 35 ILCS 120/1, provides that construction contracts for the improvement of real estate consisting of engineering, installation, and maintenance of voice, data, video, security, and all telecommunications systems do not constitute engaging in a business of selling tangible personal property at retail if they are sold at one specified contract price. We do not have sufficient information about the specific conditions of operations such as yours to determine if this provision is applicable.

I hope this information is helpful. If you require additional information, please visit our website at [www.ILTAX.com](http://www.ILTAX.com) or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Martha P. Mote  
Associate Counsel

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